U.S.
AUG 18 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS G. FAZZI
Attorney & Counselor at Law
10788 Civic Center Drive
Rancho Cucamonga, California
91730-3805
Telephone: (909) 980-2171
Attorney for Petitioner

August 18, 1993

QUESTIONS PRESENTED

1. Does *ERISA* preempt an insured's action for policy benefits against an insurer which insures long term disability, where the employee benefit plan is defunct and cannot be sued?

If so,

2. May an *ERISA* Plan participant of a defunct employee benefit plan bring a civil action under 29 *U.S.C.* §1132(a) for failure to pay insurance benefits and/or other equitable relief against the insurer which is also an *ERISA* Plan fiduciary?

If not,

3. Where ERISA denies any remedy to a Plan participant/insured, yet continues to preempt the participant's state law claims, has the participant

(a) been denied due process under the 5th Amendment, and/or

(b) been deprived of property under the 5th Amendment for which just compensation must be paid?

PARTIES TO THE PROCEEDING

Petitioner, LAWRENCE DOCKTER, Plaintiff-Appellant in the Court below.

Respondent, AETNA LIFE INSURANCE COMPANY, Defendant-Appellee in the Court below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
(a) Basis for Federal Jurisdiction in the Court of Appeals.	2
(b) Factual Background and Relevant Procedural History.	3
(i) Procedures in the District Court	3
(ii) Procedures in the Ninth Circuit	8
REASONS FOR GRANTING THE WRIT	9
1. This Court Should Determine Whether *ERISA*'s Preemption Continues After an Employee Benefit Plan Ceases to Exist.	9
2. Resolution of the Issues in This Case is Necessary to Prevent Injustice and Redress a Wrong *ERISA* was Designed to Prevent.	16
3. This Court Should Prevent an Unconstitutional Taking of Petitioner's Property Without Due Process or Just Compensation.	24

TABLE OF CONTENTS, Cont'd

	Page
4. The Court Should Clarify the Scope of the Opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*	27
CONCLUSION	30
APPENDIX	App. 1
Memorandum Opinion by the Court of Appeals for the Ninth Circuit, filed March 3, 1993	App. 1
Order by the Court of Appeals for the Ninth Circuit, filed May 20, 1993	App. 12
29 *U.S.C.* §1104(a)	App. 14
29 *U.S.C.* §1132(a)	App. 16
Amendment V to the United States Constitution	App. 18

TABLE OF AUTHORITIES

CASES	Page
Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988)	14, 15, 28
Armstrong v. Fairmont Community Hospital Assoc., Inc., 659 F.Supp. 1524 (D.Minn. 1987)	27
Bernardsville Quarry, Inc. v. Borough of Bernardsville, N.J., 129 N.J. 221, 608 A.2d 608 A.2d 1377 (1992)	27
Cunha v. Ward Foods, Inc., 804 F.2d 1418 (9th Cir. 1986)	14
Davidian v. Southern California Meat Cutters Union, 859 F.2d 134 (9th Cir. 1988)	8
Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, cert. den. 488 U.S. 909, 109 S.Ct. 261 (1st Cir. 1988)	28
Firestone Tire and Rubber Co. v. Bruch, 49 U.S. 101, 109 S.Ct. 948 (1989)	16
Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 221 (1987)	10, 11
Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985)	16
Gibson v. Prudential Ins. Co. of America, 915 F.2d 414 (9th Cir. 1990)	16
Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991)	22, 23, 24, 28

TABLE OF AUTHORITIES, Cont'd

CASES	**Page**
Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S.Ct. 478 (1990)	14, 15
Johnson v. United States, 79 F.Supp. 208 (Court of Claims 1948)	27
Kanne v. Connecticut General Life Insurance Company, 867 F.2d 489 (9th Cir. 1988)	8, 26
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085 (1985)	passim
Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991), cert. den. 112 S.Ct. 2968 (1992)	8, 12, 13, 26
Omnia Comm. Co. v. U.S., 261 U.S. 502, 23 S.Ct. 437 (1923)	27
Pete v. U.S., 531 F.2d 1018, 209 Ct.Cl. 270 (1976), supplemented 569 F.2d 565, 209 Ct.Cl. 377	27
Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987)	19
Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986)	22, 23, 24, 28
Warren v. Society National Bank, 905 F.2d	28
UNITED STATES CONSTITUTION	
Fifth Amendment	25, 27

TABLE OF AUTHORITIES, Cont'd

FEDERAL STATUTES	Page
29 *U.S.C.* §1002(1)	10
29 *U.S.C.* §1104(a)	15, 20
29 *U.S.C.* §1109(a)	19, 20, 23
29 *U.S.C.* §1132	5
29 *U.S.C.* §1132(a)	18, 19, 22, 23, 24
29 *U.S.C.* §1132(a)(1)(B)	5, 13, 17, 20, 21, 22
29 *U.S.C.* §1132(a)(2)	8, 20, 22
29 *U.S.C.* §1132(a)(3)	8, 16, 20, 21, 22, 23, 28, 29
29 *U.S.C.* §1132(a)(3)(A)	5, 17, 22
29 *U.S.C.* §1132(a)(3)(B)	5, 6, 17, 22
29 *U.S.C.* §1144(b)(2)(A)	11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, LAWRENCE DOCKTER, respectfully requests that a Writ of Certiorari issue to review the judgment and memorandum decision entered in this proceeding in the Ninth Circuit Court of Appeals on March 3, 1993.

OPINION BELOW

The opinion of the Court of Appeals is unreported, and was rendered in the form of a Memorandum. The Memorandum decision, filed on March 3, 1993, is reproduced in the Appendix at App. 1 - App. 11.

DOCKTER's Petition for Rehearing with a Suggestion for Rehearing en Banc was denied and

rejected, respectively, by an Order of the Ninth Circuit on May 20, 1993. The Order is reproduced in the Appendix at App. 12.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was filed on March 3, 1993. The Petition for Rehearing and Suggestion for Rehearing en Banc was denied by an Order filed on May 20, 1993. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1.)

STATUTES INVOLVED

This case involves the application of 29 *U.S.C.* §§1104(a), 1132(a)(1), and 1132(a)(3); and the "due process" and "taking" clauses of Amendment V of the Constitution of the United States. These provisions are reproduced in the Appendix at App. 14 - App. 18.

STATEMENT OF THE CASE

(a) Basis for Federal Jurisdiction in the Court of Appeals.

This action was instituted by Petitioner LAWRENCE DOCKTER in the Superior Court of the State of California, County of Los Angeles, on October 29, 1987. On December 19, 1988, Respondent AETNA LIFE INSURANCE COMPANY ("AETNA") removed this action to the United States District Court for the Central District of California, pursuant to 28 *U.S.C.* §1441(a) and (b), and 29 *U.S.C.* §1132(e)(1). On October 31, 1989, Petitioner filed his First Amended Complaint.

AETNA moved for Judgment on the Pleadings

on the First Amended Complaint, which was granted by the District Court on August 20, 1990. Petitioner filed a Motion for Leave to File a Second Amended Complaint on January 25, 1991, which was denied by the District Court on February 25, 1991. This action was dismissed by the District Court pursuant to an Order entered on July 17, 1991.

Petitioner timely filed his Notice of Appeal with the United States Court of Appeal for the Ninth Circuit. On March 3, 1993, the Ninth Circuit filed its Memorandum Opinion, affirming the District Court's judgment of dismissal.

Thereafter, Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing en Banc. By an Order entered on May 20, 1993, the Ninth Circuit denied Petitioner's request for a rehearing and rejected the suggestion for rehearing en banc.

This Petition for Writ of Certiorari is timely filed pursuant to *Rules of the Supreme Court*, Rule 13.4.

(b) Factual Background and Relevant Procedural History.

(i) Procedures in the District Court

Respondent AETNA issued a Group Long-Term Disability Policy to GETTY OIL COMPANY ("GETTY OIL"), Group Policy No. LTD-386052, Group Control No. 311424, with an effective date of February 1, 1980, covering its employees. Premiums for the LTD insurance policy were paid by employee

payroll deduction, forwarded by GETTY OIL to AETNA. LTD claims were adjusted by AETNA, which had discretion to pay or deny a claim. AETNA was therefore a Plan fiduciary, a fact admitted by AETNA in the courts below.

DOCKTER was hired by GETTY OIL in January 1981 as a pilot and mechanic for GETTY OIL's fleet of corporate aircraft, and was issued an individual certificate of coverage under the LTD policy.

In March, 1984, DOCKTER was diagnosed with a disabling disease, which caused him to become totally disabled. DOCKTER reported this to GETTY OIL and requested claim forms in order to file an LTD claim. GETTY OIL and/or AETNA delayed and refused to provide the claim forms to Petitioner for approximately two years. Petitioner was finally provided with the claim forms in 1986, and after returning them to GETTY OIL/AETNA, no action was taken on the claim forms for ten (10) months, at which point AETNA denied Petitioner's claim.[1] Petitioner made repeated requests of AETNA to reconsider his claim, to no avail.

Petitioner ceased employment with GETTY OIL in July, 1984, due to his illness, and has been totally disabled since that time.[2]

---

[1] AETNA contends it did not deny Petitioner's claims prior to the institution of this action.

[2] AETNA disputes this, contending Petitioner voluntarily terminated his employment with GETTY OIL.

Petitioner filed this lawsuit in state court on October 29, 1987, alleging state causes of action for bad faith failure to pay insurance benefits. AETNA filed its Answer to the Complaint on December 15, 1988, and thereafter removed the action to the United States District Court for the Central District of California on December 19, 1988.

Petitioner filed a First Amended Complaint, reframing his state law action as a one-count *ERISA* complaint for breach of fiduciary duties. In Paragraph 1 of his First Amended Complaint, Petitioner claimed jurisdiction and requested remedial relief under

> . . . [s]ection 502(a)(1)(B) of the *Employee Retirement Income Security Act of 1974* [29 *U.S.C.* §1132], hereinafter "ERISA." This action is brought for the purpose of obtaining benefits under the terms of an employee benefit plan; to clarify DOCKTER's right to future benefits under an employee benefit plan; and, to obtain other equitable relief, attorney's fees, and injunctive relief precluding defendants, and each of them, from withholding benefits under plaintiff's employee benefit plans."[3]

---

[3] The Court's attention is respectfully invited to the fact that while standing was invoked only under one subsection of *ERISA* §502[i.e.,(a)(1)(B)] [29 *U.S.C.* §1132(a)(1)(B)], the specific remedies requested by Petitioner are all of the remedies available to a participant on an individual level under §1132(a): The recovery of benefits and a clarification of his rights to future benefits (29 *U.S.C.* §1132(a)(1)(B)); injunctive relief (29 *U.S.C.* §1132(a)(3)(A)); and other appropriate equitable relief (29 *U.S.C.*

On November 13, 1989, AETNA answered Petitioner's First Amended Complaint.

On May 29, 1990, GETTY OIL COMPANY and GETTY LONG-TERM DISABILITY PLAN were served with the First Amended Complaint. On June 14, 1990, FOUR STAR OIL AND GAS COMPANY, the successor in interest to GETTY OIL COMPANY, filed an Answer to the First Amended Complaint on behalf of GETTY OIL only.[4]

On April 27, 1990 AETNA filed its Motion for Judgment on the Pleadings. Defendant FOUR STAR filed a declaration of Peter J. Stathis regarding Aetna's Motion for Judgment on the Pleadings.[5] On July 30, 1990, the District Court

---

§1132(a)(3)(B).) The significance of this broader scope of requested relief will be made apparent, *infra*.

[4] In its Answer, FOUR STAR admitted that GETTY OIL was the sponsor and administrator of the GETTY LONG-TERM DISABILITY PLAN, and that AETNA had the authority to review denied LTD claims. FOUR STAR contended, in its Second Affirmative Defense, that all "matters concerning claims and payment of claims under the Getty Oil Long Term Disability Plan are entirely between Aetna Life and Casualty Company and the beneficiary."

[5] Mr. Stathis stated that on March 1, 1986, the GETTY LONG TERM DISABILITY PLAN was terminated and no longer existed; that AETNA was the insurer of all benefits under the Plan; the Plan was entirely paid for by employees of GETTY OIL; that GETTY OIL was not responsible for paying any LTD benefits; and that AETNA was solely responsible for determining whether participants were entitled to benefits and, in fact, processed and paid all plan claims.

granted AETNA's Motion for Judgment on the Pleadings.

Defendant FOUR STAR then moved for Judgment on the Pleadings. Due to the District Court's previous ruling on AETNA's motion, DOCKTER filed a Statement of Non-Opposition and a Request to File an Amended Complaint. On October 29, 1990, the court granted FOUR STAR's Motion for Judgment on the Pleadings and permitted Petitioner to file a Motion for Leave to File a Second Amended Complaint.

On January 25, 1991, DOCKTER filed his Motion for Leave to file a Second Amended Complaint, and lodged his proposed Second Amended Complaint.[6] In his Motion, Petitioner contended that because the ERISA Plan was defunct and the District Court had ruled he could not sue AETNA or FOUR STAR under ERISA, that ERISA no longer controlled and AETNA could be sued on a state claim under the insurance policy.

AETNA filed an opposition to Petitioner's Motion, and sought sanctions against DOCKTER for filing the Motion. On March 29, 1991, the District Court denied Petitioner's Motion, finding that the claims set forth in the Second

---

[6] The Proposed Second Amended Complaint alleged two causes of action, for breach of the duty of good faith and fair dealing under California law, and declaratory relief, requesting a determination of Petitioner's physical status and a declaration of the rights of the parties. DOCKTER requested contractual and consequential damages, as well as punitive damages.

Amended Complaint were pre-empted by ERISA, 29 *U.S.C.* §1001 et seq., citing *Kanne v. Connecticut General Life Insurance Company*, 867 F.2d. 489 (9th Cir. 1988) and *Davidian v. Southern California Meat Cutters Union*, 859 F.2d. 134 (9th Cir. 1988). The court also denied AETNA's Motion for Sanctions, finding that Petitioner's Motion to Amend appeared to have been brought in good faith.

Petitioner thereafter timely filed his Notice of Appeal.

(ii) Procedures in the Ninth Circuit

Petitioner's Opening Brief on appeal presented three issues to the court: (1) When an *ERISA* Plan no longer exists and cannot be sued, did the District Court abuse its discretion when it refused to allow an individual participant/insured to amend his complaint to set forth a state law claim against the Plan fiduciary/insurer; (2) May a participant/insured under a defunct *ERISA* Plan sue the Plan fiduciary, the insurer who issued the group insurance policy to the Plan and who had the authority to deny the participant's claim; and (3) Does *ERISA* preempt a participant's state law claims even though *ERISA* itself does not provide a remedy?

The Ninth Circuit affirmed the District Court's Order, holding that ". . . *ERISA* preempts state law claims even if the plaintiff is left without a remedy" (citing *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir. 1991),

cert. den. 112 S.Ct. 2968 (1992).) [Appendix, App. 6.] The court also held that Petitioner could not proceed against AETNA under 29 *U.S.C.* §§1132(a)(2) or 1132(a)(3.) [Appendix, App. 9.]

Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing en Banc, which was denied by Order of the Ninth Circuit on May 20, 1993. [Appendix, App. 12.]

REASONS FOR GRANTING THE WRIT

1. This Court Should Determine Whether *ERISA*'s Preemption Continues After an Employee Benefit Plan Ceases to Exist.

The GETTY LONG-TERM DISABILITY PLAN terminated in March, 1986, while Petitioner's claim for LTD benefits was pending, and after Petitioner was forced to cease employment with GETTY OIL as a result of his disabling disease.

Since the Plan did not exist, and FOUR STAR, the successor in interest to GETTY OIL, was found not to be an *ERISA* fiduciary[7], AETNA, as the Plan fiduciary who made benefit determinations and the issuer of the group master insurance contract, was the only party

---

[7] This finding was based on the facts that FOUR STAR was not the Plan and could not be compelled to provide benefits under the GETTY Plan. It was also supported by the facts that AETNA was solely responsible for processing and administering LTD claims; made the decisions to pay or deny those claims; issued all benefit checks; and because GETTY OIL's only involvement was to collect premiums for the LTD policy via employee payroll deductions and forward them on to AETNA. (See fn. 4 and 5, *supra*.)

responsible to Petitioner and since the Plan terminated, and could not be sued, *ERISA* no longer preempts this action for benefits against the insurer under state common law.

ERISA's broad preemption terminated when the *ERISA* Plan terminated. There are no reported decisions addressing this precise issue; that is, whether *ERISA* preemption continues to apply after a plan is no longer "established or maintained." *ERISA* only applies to employee benefit plans which are "established or maintained" pursuant to 29 *U.S.C.* §1002(1.)[8] The purpose of *ERISA* preemption cannot be implicated after a plan terminates. In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 10, 107 S.Ct. 221 (1987), this Court held that the purpose of *ERISA* preemption is to eliminate conflicting or inconsistent state and local regulation of employee benefit plans. Once an *ERISA* Plan ceases to exist, continued Federal preemption does not further any purposes of *ERISA*, and should not be imposed. In *Fort Halifax*, this Court held that an employer that makes a commitment to systematically pay certain

---

[8] 29 *U.S.C.* §1002(1) defines "employee welfare benefit plan" and "welfare plan" as, ". . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer * * * to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, [medical, surgical, hospital care, sickness, accident, disability, death, unemployment or other benefits as defined]."

benefits undertakes a host of obligations, including eligibility determinations, benefit level calculation, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with reporting requirements. (482 U.S. at 10.) Where, as here, a plan no longer exists, these purposes cannot be implicated. This is especially so where benefits are insured under a group insurance policy, and the certificate of coverage issued directly to the insured. The insurer, which must comply with the state insurance regulations of every state where the insurer does business, is not subject to the same requirements. (See 29 *U.S.C.* §1144(b)(2)(A) [*ERISA* preemption does not exempt insurers from state law which regulates insurance.])

In *Fort Halifax*, the Court made it clear that Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures, governed by a single set of regulations. This concern has no application, with respect to benefits provided under group insurance policies issued by bona fide insurers such as AETNA, especially where the plan itself no longer exists, and can neither sue nor be sued. The only mechanism whereby Petitioner has any remedy whatsoever is by virtue of a direct action against the insurer based on his contractual rights as an insured under an insurance policy.

This Court, in *Fort Halifax*, further

explained *ERISA*'s regulatory concerns. It was explained that *ERISA*'s fiduciary standards would safeguard employees from the abuses of self-dealing, imprudent investing, and misappropriation of plan funds. The focus of *ERISA* is on the administrative integrity of plans, and Congress acted to insure uniform regulation of plan activities. Plan operations are the focus of *ERISA*'s regulation, as well as the desire to insure uniform regulation of those operations. None of these concerns are relevant where the employee benefit plan has ceased to exist, cannot be sued, or served with process, and where only the insurance company, the insurance policy, and the relationship between the insurer and insured are all that is left.

The plain fact of the matter is that no plan is presently "established or maintained", and in the absence of a plan, there can be no *ERISA* regulation; without *ERISA* regulation, there can be no preemption of state contractual rights between insurer and insured.

Both the District Court and the Ninth Circuit disagreed. The courts below held that even though *ERISA*, as they applied it, did not provide a remedy, *ERISA*'s preemption continued beyond the termination of the plan, to bar Petitioner's state law remedies.

The Ninth Circuit relied on *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir. 1991), cert. den., 112 S.Ct. 2968 (1992), in support of its decision. This reliance on *Olson* is misplaced.

The Circuit Court of Appeals held that even though Petitioner was left without any remedies under *ERISA*, "*ERISA* preempts state law claims even if the plaintiff is left without a remedy." [Memorandum Opinion, Appendix, App. 6] *Olson* is readily distinguishable from the instant matter. There, the plaintiff was originally employed by General Dynamics, and was a participant in an *ERISA* pension plan. His division was sold to Allied Signal. Plaintiff claimed that General Dynamics and Allied Signal made oral misrepresentations which resulted in receiving a lower amount of retirement benefits than he would have received had he remained with General Dynamics and not accepted the position with Allied Signal. [9] The court noted that the plaintiff's complaint did not deal with an allegation that he was denied benefits under the plan; only that he did not receive the amount of benefits he thought he should have received. (960 F.2d at 1420.)[10]

---

[9] In the concurring opinion, it was noted that had plaintiff not accepted a job from Allied Signal, he would not have been rehired by General Dynamics; thus his reliance on the representations was "of no practical consequence." (960 F.2d at 1423-1424, fn. 1)

[10] The court noted that Mr. Olson's claim against the defendants was based solely on state law; he made no attempt to assert a claim under 29 *U.S.C.* §1132(a)(1)(B). (960 F.2d at 1422, fn.3.) The court's decision was therefore limited to the preemption issue; it did not include the remedies available under §1132(a)(1)(B) when it held that ERISA did not provide him with a remedy. The Ninth Circuit

Here, on the other hand, Petitioner did assert a claim under *ERISA*; it was the lower court who took away his *ERISA* remedies, denied him recourse to state law remedies, and then held that *ERISA* preempted those remedies, "even if the plaintiff is left without a remedy." [Memorandum Opinion, Appendix, p. 4.]

AETNA relied on *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418 (9th Cir. 1986), *Ingersoll-Rand Co. v. McClendon*, ___U.S. ___, 111 S.Ct. 478 (1990), and *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988.) AETNA's reliance is also misplaced.

Cunha, supra, held that *ERISA* did not apply to pension plans which terminated before *ERISA* was enacted. Contrary to AETNA's assertion that *Cunha* "implies" that *ERISA* continues to apply to plans which terminated after 1974, that is not what the case says, and no reported decision has cited it for that proposition.

Ingersoll-Rand is likewise unpersuasive. There, this Court held that the plaintiff's state law claim was subject to *ERISA* because it arose out of an *ERISA* plan, and thus was properly removed to federal court, notwithstanding the "traditional limitation imposed by the 'well-pleaded complaint' rule." (111 S.Ct. at 486.) It is also important to note that the plaintiff

---

misinterpreted its decision in *Olson*, viz-a-viz its application to the facts facing Petitioner, and its reliance on this case is therefore misplaced.

was not denied a remedy: "It is clear that the relief requested here is well within the power of the federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits." (*Id.*)

In *Amalgamated, etc. v. Murdock*, the court held that *ERISA* applied to a terminated pension plan, and imposed a constructive trust on the breaching fiduciary to prevent his unjust enrichment. In that case, however, the plan participants, unlike Petitioner herein, had received all of the benefits to which they were entitled under the plan. *ERISA* did not, therefore, operate to deny them a remedy.

Thus, it can be seen that each of the cases relied on by AETNA is distinguishable from the instant matter.

The result below is a complete miscarriage of justice and defeats the very purpose for the enactment of *ERISA*: To protect the rights of individual participants. It also eviscerates 29 *U.S.C.* §1104(a) [*ERISA* §404(a)], thereby destroying any potential source of protection for individual participants when plan fiduciaries fail to live up to the "prudent man standard of care" imposed on them by Congress for the express purpose of protecting individual plan participants.[11]

---

[11] Petitioner respectfully invites this Court's attention to the concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, *infra*, in which Justice Brennan addressed this

2. Resolution of the Issues in This Case is Necessary to Prevent Injustice and Redress a Wrong *ERISA* was Designed to Prevent.

Petitioner urges that not allowing him the right to sue AETNA directly, under either *ERISA* or state law, denies him any remedy to enforce the insurance contract to which he is a party. If nothing else, even if *ERISA* preemption still applies, Petitioner should have been allowed to bring suit against AETNA as a Plan fiduciary under 29 *U.S.C.* §1132(a)(3) in order to obtain "other appropriate equitable relief."

Denying Petitioner <u>any</u> remedy under either *ERISA* or state law is contrary to this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 49 U.S. 101, 109 S.Ct. 948 (1989), in which the Court refused to apply a standard of review that would afford an *ERISA* participant or beneficiary <u>less</u> protection than they enjoyed prior to *ERISA*'s enactment.

In the court below, AETNA contended, and the court agreed, that a participant's request for the recovery of *ERISA* benefits and/or a declaration as to the right to future benefits cannot be asserted against a Plan fiduciary, but only against the *ERISA* Plan, itself. (Citing *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414 (9th Cir. 1990) and *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985).) AETNA asserted that DOCKTER's First Amended

---

precise issue.

Complaint "explicitly" sought "only" [12] to recover benefits under the Plan [13], and was based solely upon 29 *U.S.C.* §1132(a)(1)(B). [14] AETNA contended, therefore, that under *Gibson* and *Gelardi*, only the Plan could be held liable in a suit for the recovery of Plan benefits; as a fiduciary, it was only liable for breach of fiduciary duties. Both the trial court and the Circuit Court of Appeals agreed.

The Ninth Circuit Court of Appeals, in its Memorandum Opinion, held that *ERISA* did not allow any civil actions for breach of fiduciary duties, where an individual participant, such as

---

[12] Appellee's Brief, p. 12, emphasis in original.

[13] *Id.* Respondent quoted directly from Petitioner's pleading: " 'This action is brought for the purpose of obtaining benefits under the terms of an employee benefit plan; to clarify DOCKTER's right to future benefits . . . and, to obtain other equitable relief, attorney's fees and injunctive relief precluding defendants . . . from withholding benefits under plaintiff's employee benefits plans.' " As pointed out in fn. 3, *supra*, "equitable" and "injunctive" relief, as ERISA remedies, are available under §1132(a)(3) and are in addition to the recovery of benefits, not part of the recovery of benefits.

[14] *Id.* Respondent misstates the facts. As pointed out in fn. 2, *supra*, while the *ERISA* section number was designated as "502(a)(1)(B)", the *United States Code* was designated as "29 *U.S.C.* §1132." As also pointed out, the specific remedies requested encompassed all remedies available to a participant in his individual capacity, under 29 *U.S.C.* §§1132(a)(1)(B), 1132(a)(3)(A), and 1132(a)(3)(B).

Petitioner herein, sought relief for his sole benefit, rather than for the benefit of the *ERISA* Plan, as a whole. [Appendix, at App. 11.] The Ninth Circuit also held that even though *ERISA* did not provide any remedy to redress the wrong suffered by Petitioner, *ERISA* preempted all state law remedies which could redress the wrong. [Appendix, at App. 9 - App. 10.]

The decision by the Ninth Circuit emasculates the underlying Congressional purpose in enacting ERISA, ignores this Court's ruling in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985), and renders a nullity the long-held maxim, "Where there is a wrong, there is a remedy." For these and other reasons, Petitioner respectfully submits this Court should grant his Petition.

In *Massachusetts Mutual Life Ins. Co. v. Russell, supra*, this Court noted that 29 *U.S.C.* §1132(a) provides "six carefully integrated civil enforcement provisions" (473 U.S. at 146, 105 S.Ct. at 3092) which are designed to protect the financial integrity of an *ERISA* plan, as a whole, as well as the individual rights of plan participants and beneficiaries.[15]

Furthermore, this Court has articulated the

---

[15] It was, in part, because of these carefully integrated civil enforcement provisions that this Court declined to extend §1109(a) [*ERISA* §409(a)] liability beyond actions brought on behalf of the Plan, as a whole, to include individual actions by participants and beneficiaries. (473 U.S. at 144, 105 S.Ct. at 3091.)

Congressional intent behind *ERISA*, to protect the legal and equitable rights of plan participants and beneficiaries. It is this Congressional intent which has been cited as the rationale for the broad preemptive effect *ERISA* has on state law claims. (See generally, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, (1987).)

In the present case, despite the "six carefully integrated civil enforcement provisions" provided under §1132(a), and enforced through the broad scope of *ERISA* preemption, the Ninth Circuit's interpretation of *Russell* deprived Petitioner of all of his *ERISA* remedies, as well as all remedies he would have if *ERISA* did not preempt his state law remedies. The Court of Appeals' interpretation distorted this Court's ruling in *Russell*, and effectively operates as an impairment of Petitioner's right to make and enforce contracts without "due process" and amounts to a "taking" of Petitioner's property (contract) in violation of the Fifth Amendment.

In *Russell*, this Court found that 29 *U.S.C.* §1109(a), imposing personal liability on *ERISA* fiduciaries for breaching their duties under §1104, was enacted primarily for the benefit of an *ERISA* Plan, as a whole, rather than for the benefit of an individual Plan participant. This Court held, therefore, that an individual participant, relying solely on §1109(a), could not bring suit against an *ERISA* fiduciary for injuries sustained only by the participant. (473

U.S. at 142, 105 S.Ct. at 3090.) This Court also held that relief for harm sustained solely by individual participants or beneficiaries could be recovered only under §1132(a), and that §§1109(a), 1132(a)(1)(B), and 1132(a)(2) did not authorize the recovery of extracontractual damages. (473 U.S. at 146, 105 S.Ct. at 3092-3093.)[16]

The Court noted, at fn. 5, that its decision was specifically limited to a claim of extracontractual damages based on liability imposed by §1109(a), and that the remedies available to individual participants under §1132(a)(3) were not at issue: "[W]e have no occasion to consider whether any other provision of *ERISA* authorizes the recovery of extracontractual damages." (473 U.S. at 139, 105 S.Ct. at 3088; accord, 473 U.S. at 150, 105 S.Ct. at 3094 (emphasis added.) [17]

---

[16] Unlike Petitioner herein, the plaintiff in *Russell* was not denied benefits under the ERISA plan. Her claim in this Court was based solely on the fact she should be allowed to recover extracontractual damages.

[17] Justice Brennan, joined by Justices White, Marshall, and Blackmun, stated in a concurring opinion, "Accordingly, we save for another day the questions (1) to what extent a fiduciary's mishandling of a claim might constitute an actionable breach of the fiduciary duties set forth in §404(a), and (2) the nature and extent of the 'appropriate equitable relief . . . to redress' such violations under §502(a)(3) [29 *U.S.C.* §1132(a)(3)]." (473 U.S. at 150, 105 S.Ct. at 3094; emphasis added.) Petitioner's case falls squarely within these questions.

The *Russell* decision was therefore specifically limited to suits brought for breach of fiduciary duties imposed by 29 *U.S.C.* 1109(a) against *ERISA* fiduciaries by participants or beneficiaries on behalf of themselves, rather than for the Plan, for the recovery of extracontractual damages. *Russell* did not affect, nor was it intended to affect, causes of action brought by a Plan participant, on his own behalf, against a Plan fiduciary under 29 *U.S.C.* §1132(a)(3), in which the participant was not seeking extracontractual damages. That, however, is how the Ninth Circuit has interpreted this Court's holding in *Russell*.

In his First Amended Complaint, Petitioner brought suit under 29 *U.S.C.* §1132(a) against an *ERISA* fiduciary (AETNA) for breach of fiduciary duties.[18] In both the jurisdictional allegation

---

[18] In the prayer of the First Amended Complaint, Petitioner specifically requests "2. . . .an injunction requiring defendants . . . to immediately qualify plaintiff for long term disability benefits under the disability plan, . . ."; "5. For an order of the Court enjoining the defendants . . . from terminating any benefit claim to which plaintiff is justly entitled . . ."; and "6. For such other and further relief as the Court may deem just and proper." The remedies under §1132(a)(1)(B) relate to the traditional concept of "damages", a legal remedy; in contrast, an injunction requiring that Petitioner be qualified for the receipt of benefits, and an order enjoining the termination of a claim for benefits are traditionally equitable remedies, as is additional relief as "the Court may deem just and proper." The remedies set forth in §1132(a)(3) fall within this category.

of the complaint, and in the prayer, Petitioner stated that he was seeking to recover insurance benefits and to clarify his rights to future benefits (§1132(a)(1)(B)); and/or injunctive relief (§1132(a)(3)(A)); and/or other appropriate equitable relief (§1132(a)(3)(B).) In this pleading, Petitioner did not request extracontractual damages -- he sought only the relief specifically authorized by Congress, as enumerated in §§1132(a)(1) and 1132(a)(3).

In the courts below, both the Ninth Circuit and the District Court misinterpreted *Russell*, holding that none of the civil remedies available under §1132(a) allowed for a private suit against an *ERISA* fiduciary where the participant was seeking recovery on his or her own behalf, rather than on behalf of the Plan, as a whole.

The Court of Appeals, in its Memorandum [Appendix p. 7], stated that ". . . there is no right under either §§1132(a)(2) or 1132(a)(3) for an individual to recover benefits for himself rather than on behalf of the plan." In making this determination, the Court relied on *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417 (9th Cir. 1991).

Horan, in turn, was based on a misinterpretation of the Ninth Circuit's own decision in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986.) The court in *Sokol* interpreted *Russell* to mean that no subsection of §1132(a) allowed for the recovery of extracontractual damages in an individual action by a participant against an *ERISA* fiduciary for breach of

fiduciary duties:

> "Put another way, *ERISA* grants no private right of action by a beneficiary *qua* beneficiary; rather, it accords beneficiaries the right to sue on behalf of the entire plan if a fiduciary breaches the plan's terms. It should be noted that nothing in the above-quoted passage limits the rationale of *Russell* to §409. (803 F.2d at 536; emphasis added.)

The "above-quoted passage" refers to this Court's analysis in *Russell* of why 29 *U.S.C.* §1109(a) [*ERISA* §409(a)] did not provide a "private right of action for compensatory or punitive relief", but only operated for the benefit of the Plan, as a whole. (473 U.S. at 144, 105 S.Ct. at 3091.) The court in *Sokol*, using the same analysis this Court employed in *Russell*, found that the "other equitable relief" in 29 *U.S.C.* §1132(a)(3) did not include extracontractual damages. (*Id.*)

Horan, however, interpreted the emphasized language to mean that *Russell* and *Sokol* prohibited any claim for relief, made by a participant on his own behalf under any subsection of §1132(a.) Neither *Sokol* nor *Russell*, however, stands for that proposition.

It should be noted that the plaintiff in *Sokol* was not denied all relief under *ERISA*; she was only denied relief for extracontractual damages. Furthermore, the Court of Appeals in *Sokol* specifically found that the defendant did, in fact, breach his fiduciary duties to the individual plaintiff, and that aspect of the district court's ruling was affirmed. (803 F.2d

at 534.)[19]

It is obvious, therefore, that the Court of Appeals, both here and in *Horan*, misinterpreted this Court's ruling in *Russell* as well as its own ruling in *Sokol*. Unless this Court grants this Petition and issues its Writ, Petitioner will be denied all protection under law, which completely defeats the very purpose for which Congress enacted *ERISA*.

3. This Court Should Prevent an Unconstitutional Impairment of the Right to Make and Enforce Contracts and an Unlawful Taking of Petitioner's Property Without Due Process or Just Compensation.

Petitioner submits that the District Court was incorrect when it held that *ERISA* did not allow individual suits for breach of fiduciary duties, thereby granting AETNA's Motion for Judgment on the Pleadings; Petitioner should have been allowed to proceed either on the merits of the First Amended Complaint, or under state law on his proposed Second Amended Complaint. When the remedies under *ERISA* were denied to him, however, the only remedy he had to redress the wrong he suffered was to proceed under traditional common law theories based on AETNA's duties under the insurance contract.

It was for <u>this</u> reason that Petitioner

---

[19] The fact that *Sokol* explicitly held that §1132(a) permitted a private right of action for breach of fiduciary duties was apparently overlooked by the court in *Horan*, as well as by the courts below.

sought leave of court to file a Second Amended Complaint, based on his state law remedies. Again, the courts below are guilty of misinterpreting Petitioner's aims.

If Petitioner cannot pursue his contractual rights against AETNA under *ERISA* or state law, then AETNA is being unjustly enriched by retaining both the premiums paid by Petitioner, and the benefits due him under the policy. The lower court's rulings resulted in the unfair abridgment of Petitioner's right to make and enforce a contract, for which he gave consideration, and offends traditional notions of justice and fair play.[20]

It is respectfully submitted that either *ERISA* applies and allows recovery against AETNA for breach of fiduciary duties, or it does not apply and Petitioner is free to pursue his state law remedies against AETNA under the insurance contract. As previously noted, the purpose of *ERISA*'s preemption is to establish a paramount federal remedy; it may be presumed, by such preemption, that a federal remedy exists. If no federal remedy exists, then, there can be no preemption. What remains, however, is Petitioner's contractual rights which have always existed, with or without regard to *ERISA* preemption.

---

[20] The denial of "traditional notions of justice and fair play" and denial of contract rights are central to the "due process" and "taking" clauses of the Fifth Amendment.

The Ninth Circuit held that pursuant to *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988)[21], Petitioner's state law claims were preempted by *ERISA*; therefore Petitioner could not pursue his claim against AETNA under the proposed Second Amended Complaint, even if it meant that Petitioner was left without a remedy, citing *Olson, supra*, 960 F.2d at 1422-23.

The net effect of the lower courts' circular reasoning is that Petitioner has been deprived of his rights under the *ERISA* plan, as well as his rights under the insurance contract to which he is a party. As Petitioner stated in his Petition for Rehearing with Suggestion for Rehearing en Banc, the court's opinion "amounts to a deprivation of Dockter's contractual rights without due process of law. . . . ERISA cannot operate so that, if no remedy is provided, a party's right to enforce a contract, such as an insurance policy for which consideration is paid, is lost." [Petition for Rehearing, p. 5.]

It is the public policy of the Unites States that <u>any</u> act of Congress which impairs the obligation of contracts is contrary to policy and not within the powers delegated to the Congress

---

[21] Petitioner does not dispute the law in *Kanne*. However, the facts in *Kanne* are distinguishable: There, the plaintiff <u>did</u> have remedies under *ERISA*; here, as discussed above, the court denied Petitioner his *ERISA* rights because of its misinterpretation of *Russell* and *Sokol*.

under the United States Constitution, except in specific cases, such as bankruptcy.[22]

It is clear, therefore, that the Ninth Circuit's decision in this matter has resulted in the loss of Petitioner's rights under both the Plan and the insurance policy. Petitioner enjoys constitutional protection of these rights.[23]

4. The Court Should Clarify the Scope of the Opinion in Massachusetts Mutual Life Ins. Co. v. Russell.

As discussed above, the Ninth Circuit's decision below was based on a misinterpretation

---

[22] *Johnson v. United States*, 79 F.Supp. 208, 211 (Court of Claims 1948); *Armstrong v. Fairmont Community Hospital Assoc., Inc.*, 659 F.Supp. 1524, 1533 (D.Minn. 1987) [flagrant impairment of contract by a Federal government body would be forbidden by the due process clause of the Fifth Amendment.]

[23] *Omnia Comm. Co. v. U.S.*, 261 U.S. 502, 23 S.Ct. 437 (1923) [contracts are "property" within the meaning of the Fifth Amendment]; *Bernardsville Quarry, Inc. v. Borough of Bernardsville, N.J.*, 129 N.J. 221, 608 A.2d 1377 (1992) [private property can be "taken" by the government through regulatory measures, even if regulation does not amount to physical occupation or appropriation]; *Pete v. U.S.*, 531 F.2d 1018, 209 Ct.Cl. 270 (1976), supplemented 569 F.2d 565, 215 Ct.Cl. 377 [where the effect of a government regulation on a person's property is so pervasive that the property is greatly depreciated in value or the owner's right to use the property is substantially interfered with, the regulation is considered a "taking" for which the owner is entitled to compensation.] Due process was violated when Petitioner's contractual rights under his insurance policy were "taken away" by ERISA preemption, leaving him with "no remedy."

of *Russell*, as well as its misinterpretation of its own decision in *Sokol* (see discussion pertaining to *Horan*, *supra*, at 22-24).

There are now at least four different Circuit Court of Appeal interpretations dealing with the scope of *Russell*:

(1) The interpretation found in *Sokol*, in which one panel of the Ninth Circuit found that there was a private right of action for breach of fiduciary duties under 29 *U.S.C.* §1132(a)(3), but that extracontractual damages were not authorized under that subsection.

(2) The interpretation found in *Horan* and *Amalgamated v. Murdock*, in which other panels of the Ninth Circuit found that no part of §1132(a) afforded a private right of action for breach of fiduciary duties.

(3) The interpretation found in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), in which the court found that a private right of action was available to an individual participant for breach of fiduciary duties under §1132(a)(3), and that "other equitable relief" could, in certain cases, include monetary relief.

(4) The interpretation found in *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, cert. den., 488 U.S. 909, 109 S.Ct. 261 (1st Cir. 1988), in which a private right of action was found for an individual participant for breach of fiduciary duties under §1132(a)(3), but that "other equitable relief" did not include "monetary" relief.

The apparent confusion over *Russell's*

application to private actions for breach of fiduciary duties under §1132(a)(3), just in the Ninth Circuit alone, resulted in Petitioner being denied the protection *ERISA* was designed to provide.

Admittedly, in his *ERISA* action set forth in the First Amended Complaint, Petitioner was not seeking extracontractual damages. He was, however, seeking "other equitable relief" which, under the reasoning employed by the court in *Warren*, could take the form of monetary relief. At this juncture, however, Petitioner is faced with the prospect of having no recourse under either *ERISA* or California state law, resulting in the unconstitutional deprivation of his contractual and property rights under the insurance policy without due process, and without just compensation.

Petitioner therefore respectfully requests that this Court answer the important questions presented in this Petition.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and memorandum decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LOUIS G. FAZZI
Attorney & Counselor at Law
10788 Civic Center Drive
Rancho Cucamonga, California
91730-3805
Telephone: (909)980-2171
Attorney for Petitioner

NOT FOR PUBLICATION

FILED
MAR 3 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOCKTER, Plaintiff-Appellant, v. AETNA LIFE INSURANCE COMPANY; GETTY OIL COMPANY, Defendants-Appellees.	No. 91-56029 D.C. No.CV-88-7645-KN MEMORANDUM*

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Judge, Presiding

Argued and Submitted February 1, 1993 Pasadena, California

Before: PREGERSON, LEAVY, and T R O T T, Circuit Judges.

In this case, Appellant Dockter appeals the district court's dismissal of his state law claims because they were preempted by the

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. 1988 ("ERISA"). Appellant's proposed Second Amended Complaint asserted a state law claim for "breach of the duty of good faith and fair dealing" and sought declaratory relief that Appellant was entitled to disability benefits. The district court denied Appellant's motion for leave to amend because the claims set forth in the proposed Second Amended Complaint were preempted by ERISA. However, the court explained in its order that plaintiff would be permitted to bring his complaint against the successor Plan, or in the alternative, against the predecessor or successor in interest to the Plan if the plaintiff sought a determination that the "Plan was not operated in strict accordance with 29 U.S.C. § 1133 'Claims Procedure.'" On July 17, 1991, the district court ordered the case dismissed because there were "no defendants remaining in the action." The district court had jurisdiction pursuant to ERISA, 29 U.S.C. §1132(e). We have jurisdiction pursuant to 28 U.S.C. §1291.

I.

STANDARD OF REVIEW

The denial of leave to amend is reviewed for an abuse of discretion. Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991). Such a denial, however, is "strictly" reviewed in light of the strong policy permitting amendment. Id. at 798. A dismissal without leave to amend is usually reviewed de novo. Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1472 (9th Cir. 1991). ERISA preemption is a conclusion of law reviewed de novo. Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 816 (9th Cir. 1992).

II.

ERISA PREEMPTION

Plaintiff's proposed Second Amended Complaint asserts a state law claim for "breach of the duty of good faith and fair dealing" and seeks declaratory relief that Appellant is entitled to disability benefits. "ERISA contains one of the broadest preemption clauses ever enacted by Congress." PM Group Life Ins. Co. v. Western Growers Assur. Trust, 953 F.2d 543, 545 (9th Cir. 1992) (quotation omitted). The ERISA

provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). A state law "relate[s] to" an employee benefit plan "if it has a connection with or reference to such a plan." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987) (quotation omitted). The ERISA preemptive provision is to be broadly construed and extends to common law tort and contract actions. Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1095 (9th Cir. 1985); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987). Even claims brought under state law doctrines that do not explicitly refer to employee benefit plans are preempted when the claims arise from the administration of such plans whether directly or indirectly. Ellenburg, 763 F.2d at 1095; Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985).

Plaintiff's primary contention, on appeal, is that the Plan is defunct and, therefore, he cannot sue the Plan. He contends that because there is no plan, ERISA no longer applies to this case. Plaintiff further argues this situation permits him to sue Aetna, the fiduciary of the

Plan, under California state law for breach of fiduciary duties.

All of Appellant's claims arise from his efforts to attain disability benefits under the Plan and therefore directly relate to the Plan. In his proposed Second Amended Complaint, Plaintiff claims that Aetna has breached its duty of good faith and fair dealing under California State lay by: 1) failing to pay long term disability benefit payments to plaintiff; 2) withholding long term disability benefits when plaintiff had provided adequate proof of the existence of his disability; and, 3) failing to provide a prompt and reasonable explanation for the denial of Plaintiff's claims. It is well-settled that this type of claim is completely preempted by ERISA. Greany, 973 F.2d at 818-20 (claims for negligence, unfair claims settlement practices, tortious interference with contract, and violations of state conversion statute are integrally connected to the ERISA plan and therefore preempted by ERISA); Davidian v. So. Calif. Meat Cutters Union & Food Employees Ben. Fund, 859 F.2d 134, 135 (9th Cir. 1988) (holding claims for bad faith, fraud, deceit, and breach

of fiduciary duty under California law arising out of denial of benefits are preempted by ERISA); Nevill v. Shell Oil Co., 835 F.2d 209, 212 (9th Cir. 1987) (holding claims based on California breach of contract, fraud and breach of the covenant of good faith and fair dealing to recover benefits are preempted by ERISA).

Appellant's only argument is that ERISA doesn't apply because the plan is now defunct. He seems to argue that because he has no remedy, we must find ERISA doesn't apply. Under the law, however, ERISA preempts state law claims even if the plaintiff is left without a remedy. Olson v. General Dynamics Corp., 960 F.2d 1418, 1422-23 (9th Cir. 1991) (holding state law claims preempted under ERISA and declining to devise a federal common law remedy for plaintiff even where plaintiff is left without a remedy), cert. denied, 112 S.Ct. 2968 (1992).

Because Appellant's claims arise from the administration of the Plan and because ERISA preempts state law claims even when a plaintiff is left without a remedy, we hold that ERISA preempts state law claims arising out of the administration of a plan even when the plan has

been terminated and is allegedly defunct.

III.

THE "SAVINGS CLAUSE"

Plaintiff raises the "savings clause" of ERISA in support of his argument that he should be permitted to sue Aetna under state law. Under the "savings clause," a state law that ordinarily would be preempted by ERISA may be "saved" from preemption if it "regulates insurance." See 29 U.S.C. § 1144(b)(2)(A).

Plaintiff's proposed Second Amended Complaint sets out a cause of action under California law for breach of the covenant of good faith and fair dealing. We have already determined that state law claims for breach of the duty of good faith and fair dealing are not saved from preemption by the "savings clause." Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988) ("California's common law of contract interpretation is not a law that 'regulates insurance,' and therefore is not saved from preemption."), cert. denied, 492 U.S. 906 (1989).

In Cantrell v. Great Republic Ins. Co., 873 F.2d 1249, 1250 (9th Cir. 1989), an employee sued

an insurer that had rescinded health insurance coverage of the employee's husband and child for breach of the covenant of good fait hand fair dealing. After noting that in Pilot Life, the Supreme Court held the plaintiff's common law causes of action did not fall under ERISA's "savings clause," we held the plaintiff's claims were "indistinguishable" from the claim the Supreme Court held to be preempted by ERISA in Pilot Life. Id. at 1252-53.

We have held that even claims under California's insurance statute prohibiting unfair insurance practices, California Insurance Code section 790.03(h), were preempted by ERISA. Kanne, at 493-94. Thus, plaintiff's claim in the instant case cannot be saved by the "savings clause."

IV.

CLAIMS UNDER 29 U.S.C. §§ 1132(a)(2) AND 1132 (a)(3)

Appellant claims that even if ERISA applies, he should be permitted to proceed against Aetna under 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3) which provide:

A civil action may be brought -

> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 1109(a) provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

Appellant may not proceed against Aetna under §§ 1132(a)(2) and 1132(a)(3). First, Appellant's proposed Second Amended Complaint

does not allege claims under §§ 1132(a)(2) and 1132(a)(3). Instead, Appellant's claim is for breach of the duty of good faith and fair dealing under California law. Second, even if Appellant's First Amended Complaint could be construed as asserting claims under §§ 1132(a)(2) and 1132(a)(3), these claims must fail because plaintiff seeks a remedy for his own benefit and not for the benefit of the Plan as a whole. ERISA does not permit recovery of damages by plan participants for individual injuries to the participants stemming from a fiduciary's mishandling of the individual's benefit claim. Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1417 (9th Cir. 1991) (holding there is no right under either §§ 1132(a)(2) or 1132(a)(3) for an individual to recover benefits for himself rather than on behalf of the plan). Thus, plaintiff cannot make out a claim under either §§1132(a)(2) or 1132(a)(3) and the district court did not abuse its discretion by denying leave to amend.

V.

CONCLUSION

Appellant's claim for breach of the

covenant of good faith and fair dealing arises from the administration of the Plan. ERISA preempts state law claims even when an appellant is left without a remedy. Appellant's claim cannot be salvaged by the ERISA "savings clause." Appellant cannot bring a claim against Aetna under 29 U.S.C. §§ 1132(a)(2) or 1132(a)(3) because he seeks a remedy for his own benefit and not for the Plan as a whole. We therefore affirm the district court's order dismissing this case. AFFIRMED.

NOT FOR PUBLICATION

FILED
MAY 20 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOCKTER,	No. 91-56029
Plaintiff-Appellant,	D.C. No.CV-88-7645-KN
v.	
AETNA LIFE INSURANCE COMPANY; GETTY OIL COMPANY,	
Defendants-Appellees.	O R D E R

Before: PREGERSON, LEAVY, and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied

and the suggestion for rehearing en banc is rejected.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the

circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions

of this subchapter or the terms of the plan;

AMENDMENT V-GRAND JURY INDICTMENT F O R CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

No. 93-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AETNA LIFE INSURANCE COMPANY

JOHN J. SWENSON
Counsel of Record
THOMAS E. SATROM
LAWRENCE E. KOLE
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 4000
Los Angeles, California 90067-3026
(310) 552-8500

Attorneys for Respondent Aetna Life Insurance Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Where petitioner has not alleged that an Employee Retirement Income Security Act ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. Section 1001 *et. seq.*, plan has terminated nor has petitioner presented admissible evidence of the plan's termination, has failed to attempt to effect service of process on the ERISA plan named as a defendant in his complaint, has failed to serve any discovery to determine the plan's status or the entity responsible for the plan's liabilities and has failed to seek a default judgment against the plan, may petitioner assert that he has been deprived of all remedies he might possess simply because the plan has terminated?

2. May petitioner assert that he has been deprived of due process and property under the Fifth Amendment in his certiorari petition when he has not raised such arguments in the courts below?

3. Did the Court of Appeals err in finding that ERISA preemption survives the purported termination of petitioner's ERISA plan and applies regardless of whether petitioner has a remedy against respondent as ERISA fiduciary?

4. Is there a conflict between the Court of Appeals' decision below and decisions of this Court or among the Courts of Appeals as to whether there is a right to individual relief for breach of fiduciary duty or to monetary relief under ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3)?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The parent of respondent Aetna Life Insurance Company is Aetna Life and Casualty Company. Aetna Life Insurance Company has the following non-wholly owned subsidiary: Med Southwest, Inc. Aetna Life Insurance Company has a wholly-owned subsidiary, AHP Holdings, Inc., which has certain non-wholly subsidiaries. AHP Holdings, Inc. has the following non-wholly owned subsidiaries: Healthways, Inc.; Aetna Health Plans of San Diego, Inc.; Aetna Health Plans of Colorado, Inc.; PHPSNE Parent Corporation; Aetna Health Plans of Florida, Inc.; and Partners Health Plan of Pennsylvania, Inc.

TABLE OF CONTENTS

	Page
RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES	ii
I. JURISDICTION STATEMENT: THIS COURT LACKS AUTHORITY TO GRANT THIS PETITION BECAUSE THE COURT OF APPEALS BELOW LACKED JURISDICTION	1
II. MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE	3
A. Misstatements Concerning The Procedural History	3
B. Factual Misstatements	4
III. SUMMARY OF ARGUMENT	5
IV. REASONS FOR DENYING THE WRIT	6
A. The Central Assumption Underlying The Petition, That Dockter Lacks Any Remedy, Is Inconsistent With His Failure To Pursue Recovery From The Plan	6
B. Dockter's Constitutional Arguments May Not Now Be Asserted Because They Were Not Raised Below	8
C. The Court Of Appeals Correctly Found That ERISA Preempted State Law Claims Against Aetna As Fiduciary Regardless Of Plan Termination	9
D. The Ninth Circuit's Opinion Does Not Conflict With Decisions Of This Court Nor Of Other Courts Of Appeal	10
1. The Ninth Circuit's Decision Below That There Is No Individual Right To Relief Under Section 502(a)(3) Was Consistent With *Russell*	11

2. There Is No Conflict Among The Circuits Regarding The Right To Individual Relief Under Section 502(a)(3) 12

3. This Court's Opinion in *Mertens v. Hewitt Associates* Precludes Any Conflict Among The Courts Of Appeal Regarding The Availability Of Damages Under Section 502(a)(3) 15

4. The Interpretation In *Mertens* Is Not Limited To Claims Against Non-Fiduciaries, However, Even If It Was So Limited, There Is No Conflict Among The Circuits Regarding The Availability Of Damages Under Section 502(a)(3) 16

V. CONCLUSION 18

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)	8
Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988)	9
Austad v. U.S., 386 F.2d 147 (9th Cir. 1967)	4
Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689 (6th Cir. 1989), *cert. den.*, 495 U.S. 905, *reh. den.*, 496 U.S. 932 (1990)	14,17
Davis v. United States, 417 U.S. 333, 94 S. Ct. 351, 38 L. Ed. 2d 234 (1973)	15
Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir.), *cert. den.*, 488 U.S. 909 (1988)	13,17
E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19, 106 S. Ct. 1681, 90 L. Ed. 2d 19 (1986)	8
Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985)	6
Gibson v. Prudential Ins. Co. of America, 915 F.2d 414 (9th Cir. 1990)	6
Harsch v. Eisenberg, 956 F.2d 651 (7th Cir.), *cert. den.* ___ U.S. ___, 113 S. Ct. 61 (1992)	13,17
Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991)	13
In re White Farm Equipment Co., 42 B.R. 1005 (N.D.Ohio 1984)	9
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S.Ct. 478, 112 L. Ed. 2d 474 (1990)	7,9-10
International Union UAW Local 91 v. Park-Ohio Indus., 876 F.2d 894 (6th Cir. 1989)	14,17
Kuhl v. Lincoln Nat'l Health Plan of Kansas City, 999 F.2d 298 (8th Cir. July 7, 1993)	16

Table of Authorities Continued

Page

Lafoy v. HMO Colorado, 988 F.2d 97 (10th Cir. 1993) 17

Lee v. Burkhart, 991 F.2d 1004 (2nd Cir. 1993) .. 17

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L. Ed. 2d 96 (1985) 11

Mertens v. Hewitt Associates, ___ U.S. ___ , 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) 10,12,15-16

Novak v. Anderson Corp., 962 F.2d 757 (8th Cir. 1992), *cert. den.*, ___ U.S. ___ , 113 S. Ct. 2928 (1993) 17

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L. Ed. 2d 49 (1987) 9

Powell v. Chesapeake & Potomac Telephone Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986) 17

Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986) 12-13,17

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, (5th Cir.), *reh. den.*, 797 F.2d 977 (1986), *cert. den.*, 479 U.S. 1034, 479 U.S. 1089 (1987) 17

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) 1,3

United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir.), *reh. den.*, 861 F.2d 1281 (1988), *cert. den.*, 489 U.S. 1096, *reh. den.*, 490 U.S. 1076 (1989) 17

Warren v. Society National Bank, 905 F.2d 975 (6th Cir. 1990), *cert. den.*, ___ U.S. ___ , 111 S. Ct. 2256 (1991) 13-14,17

Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957) 15

Table of Authorities Continued

	Page
Constitutional Provisions and Statutes:	
U.S. Const. amend V	8
28 U.S.C.	
§ 1254	1,3
§ 1291	1
§ 1292	1,3
29 U.S.C.	
§ 1002(1)	9
§ 1103(d)	9
§ 1109	10-11
§ 1132(a)(1)(B)	6
§ 1132(a)(2)	10-12
§ 1132(a)(3)	*passim*
§ 1132(d)	7
Other Authorities:	
Federal Rules of Evidence	
Rule 402	5
Rule 602	5
Federal Rules of Civil Procedure	
Rule 12(f)	5
Rule 54	3
Sixth Circuit Rule 24(c)	14
Supreme Court Rule 10.1	14
13 Moore's Federal Practice ¶ 810.21	15
Stern, Gressman & Shapiro *Supreme Court Practice* § 4.6 (1986)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-308

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AETNA LIFE INSURANCE COMPANY

I. JURISDICTION STATEMENT: THIS COURT LACKS AUTHORITY TO GRANT THIS PETITION BECAUSE THE COURT OF APPEALS BELOW LACKED JURISDICTION

Petitioner Lawrence Dockter's ("Dockter") petition should be denied because the Court of Appeals below lacked jurisdiction. *See* 28 U.S.C. § 1254 (only cases "in" the Courts of Appeals may be reviewed by this Court on certiorari); *United States v. Nixon*, 418 U.S. 683, 690-92, 94 S. Ct. 3090, 3098-99, 41 L. Ed. 2d 1039 (1974)(certiorari review requires that the Court of Appeals' jurisdiction has been properly invoked).

As the following explanation shows, the District Court never rendered a decision over which the Court of Appeals had jurisdiction. *See* 28 U.S.C. § 1291 & 1292.

Dockter neglects to mention the basis for the District Court's order purporting to dismiss the action. Petition at 3. The defendants named in Dockter's complaint were respondent Aetna Life Insurance Company ("Aetna"), Getty Oil Company ("Getty") and the Getty Long Term Disability Plan ("the Plan"). After Dockter served the complaint on Getty, Four Star Oil Co. ("Four Star"),[1] Getty's successor company, appeared in the action in lieu of Getty. The District Court's dismissal order stated that no defendants remained in the action. In support of this order, the District Court referred to its prior orders granting Aetna's motion for judgment on the pleadings and defendant Four Star's motion for dismissal, and denying Dockter's motion for leave to amend. However, none of these earlier orders dismissed the First Amended Complaint in its entirety. The effect of these orders was to grant judgment for Aetna on the First Amended Complaint, to dismiss that complaint as to Four Star, and to refuse to allow an amendment to that complaint proposed by Dockter. As a result, the First Amended Complaint remained as against the Plan and the District Court erred in finding that no defendants remained.

Therefore, the District Court never rendered a decision over which the Court of Appeals had jurisdiction as its order was neither a final judgment under

---

[1] Subsequent to Texaco, Inc.'s purchase of Getty, Getty was renamed Four Star. Four Star has admitted that it is Getty's successor in interest.

Federal Rules of Civil Procedure Rule 54[2] nor was it an appealable interlocutory decision under 28 U.S.C. Section 1292[3]. As the jurisdiction of the Court of Appeals was not properly invoked below, this action was never "in" the Court of Appeals, therefore, this Court lacks authority to review the case by a writ of certiorari. *See* 28 U.S.C. § 1254; *Nixon*, 418 U.S. at 690-92.

II. MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

A. Misstatements Concerning The Procedural History

As discussed above, Dockter's statement of the case is incorrect because the Court of Appeals lacked jurisdiction over this case. The summary of the proceedings below contained in Dockter's statement of the case is generally accurate, however, it contains two important misstatements. First, as discussed above, Dockter failed to mention that the District Court erred when it stated that no defendants remained in the case in its order of dismissal. In addition, Dockter erroneously states that he served his First Amended Complaint on the Plan. Petition at 6. Dockter has never before claimed to have performed such service nor does the record below contain any indication that the Plan was served.

---

[2] The District Court did not terminate the action as to all defendants nor did it direct entry of a final judgment as to fewer than all of the claims or parties. Fed. Rules Civ. Proc. Rule 54(b).

[3] The District Court's order did not involve an injunction or a receiver, nor an admiralty case, nor did it certify the order for an interlocutory appeal. 28 U.S.C. § 1292.

B. Factual Misstatements

This petition concerns the adequacy of Dockter's pleading, therefore, it is improper for Dockter to assert additional facts not alleged in his complaint or to seek to rely on extrinsic evidence. *See Austad v. U.S.*, 386 F.2d 147, 149 (9th Cir. 1967). As the plaintiff's material allegations of fact must be accepted as true for the purpose of motions testing the adequacy of the complaint, Aetna accepted Dockter's allegations as true *arguendo* in the Courts below.[4]

The following factual assertions made by Dockter in his petition are misstatements because they are either not contained in his complaint or are inconsistent with allegations made therein. Dockter never alleged that premiums were paid by employee payroll deduction and forwarded by Getty, Dockter's former employer, to Aetna. Petition at 3-4. The complaint alleged that Aetna had discretion to review denied claims, not that claims were adjusted by Aetna and that Aetna had discretion to pay or deny a claim. *Id.* at 4. The complaint alleges that Getty, not Aetna, delayed providing claims forms to Dockter, that Dockter returned the forms to Getty, not Aetna, and that Aetna merely reviewed and affirmed the denial of Dockter's claim, not that Aetna denied the claim. *Id.* Dockter asserts that the Plan terminated in March 1986, however, he has never alleged termination in any pleading. *Id.* at 9.

---

[4] Of course, Aetna accepts these allegations as true solely for the purposes of the proceedings which occurred below and this petition; it does not admit that any of these allegations are true, nor does it waive any rights it has to contest any of these allegations in the future.

Dockter made additional factual misstatements in his petition which were derived from improper extrinsic evidence. Citing a declaration offered by Four Star, Dockter asserts *inter alia* that the Plan terminated in 1986 and that the Plan no longer exists.[5] Dockter also misstates that Four Star was "found" not to be an ERISA fiduciary—the District Court made no such finding. *Id.* Dockter further makes a baseless representation that the District Court's purported "finding" was based on the statements made in the above-mentioned declaration, which statements, in any event, are extrinsic and inadmissible[6]. *Id.* at 9 & n. 7. The District Court never stated that its ruling was based in any manner on this declaration.

III. SUMMARY OF ARGUMENT

Dockter has failed to pursue recovery from the Plan, therefore, his central factual assumption, i.e., that he lacks any remedy, is false. Even if Dockter had been left remediless, he may not advance the constitutional arguments contained in his petition because they were never raised below. Dockter has not established any

---

[5] Additional misstatements are that Aetna was insurer of all benefits under the Plan, was solely responsible for processing and administering claims and for determining benefit eligibility, processed, paid and made all decisions as to paying or denying all claims, and issued all benefit checks; that the Plan was entirely paid for by employees of Getty; that Getty was not responsible for paying any Plan benefits and was only involved by collecting Plan premiums and forwarding them to Aetna. Petition at 6, n. 5, & 9, n. 7.

[6] The declaration is inadmissible because the declarant lacked personal knowledge and because, as extrinsic evidence, it was irrelevant. *See* Fed. R. Evid. Rules 402 & 602. Aetna objected to the declaration on these grounds and moved to strike it pursuant to Federal Rules of Civil Procedure Rule 12(f).

basis for exercise of certiorari jurisdiction because the Court of Appeals' holding below that Dockter's claims were either preempted by or not cognizable under ERISA was consistent with this Court's decisions and with the decisions of the other Courts of Appeals. Furthermore, Dockter's reliance on authority showing merely an intra-circuit conflict (from a different circuit than that which ruled below) rather than a conflict among the circuits is inadequate to create a basis for certiorari jurisdiction.

IV. REASONS FOR DENYING THE WRIT

A. The Central Assumption Underlying The Petition, That Dockter Lacks Any Remedy, Is Inconsistent With His Failure To Pursue Recovery From The Plan.

Although Dockter contends that he still has an ERISA remedy against Aetna as a fiduciary under ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3) (this assertion is discussed in detail below), the primary argument made in his petition is that the purported termination of the Plan leaves him without a remedy under ERISA and that he should therefore be permitted to pursue state common law causes of action. In the proceedings below, unlike in his petition, Dockter asserted that he was entitled to sue Aetna for recovery of ERISA benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B). After this contention was rejected because actions for benefits under Section 502(a)(1)(B) may only be maintained against the ERISA Plan itself, not against ERISA fiduciaries, based on *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 417 (9th Cir. 1990) and *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-5 (9th Cir. 1985), Dockter recognized that he had no

remedy against Aetna under ERISA and attempted to amend his complaint to assert state law claims against Aetna. The District Court correctly rejected this, as ERISA preempts state law claims regardless of whether a plaintiff would otherwise lack a remedy. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144, 111 S.Ct. 478, 112 L. Ed. 2d 474 (1990)(ERISA preemption displaces all state law claims even when state law authorizes a remedy unavailable under ERISA or ERISA contains no remedy). Dockter then argued in the Court of Appeals below, and continues to so argue in his petition, that this ruling leaves him remediless (unless Dockter's misguided attempt to extend ERISA Section 502(a)(3) to allow monetary relief for individual beneficiaries is accepted), and is therefore a violation of his Fifth Amendment rights.

Dockter's contention that he lacks a remedy is fundamentally flawed because it is based on the incorrect premise that he cannot obtain relief from the Plan itself. First, Dockter has never established any basis, whether by pleading or admissible extrinsic evidence, that the Plan terminated. Even if Dockter could nonetheless rely on the Plan's purported termination, he has utterly failed to make any effort whatsoever to prosecute his claims against the Plan. Dockter never attempted to serve the Plan, even though ERISA Section 502(d), 29 U.S.C. Section 1132(d), provides that a Plan may be served by service of summons upon the Plan Administrator in its capacity as such (although Getty was the Plan Administrator, Getty was not served in its capacity as such, but rather only in its corporate capacity). Dockter failed to serve any discovery as to the Plan's current status or the identity of the party who assumed the assets and

liabilities of the Plan, nor did he try to obtain a default judgment against the Plan. For all these reasons, Dockter's central factual assumption that he has been left without a remedy unless the decisions of the lower courts are set aside is baseless.

B. Dockter's Constitutional Arguments May Not Now Be Asserted Because They Were Not Raised Below.

Dockter's argument that he has been deprived of due process and of property without just compensation in violation of the Fifth Amendment is fatally flawed, because, as discussed above, he has failed to demonstrate that he does not have an adequate remedy against the Plan itself. Regardless, though, this Court should not consider Dockter's constitutional argument because Dockter is raising this issue for the first time in his petition. This Court ordinarily will not address issues not raised below. *See e.g. E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1681, 90 L. Ed. 2d 19 (1986)(dismissing writ of certiorari as improvidently granted because this Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (refusing to consider legal basis for plaintiff's claim asserted in certiorari petition but not on appeal because this Court will not ordinarily consider issues neither raised nor considered by the Court of Appeals). There is no reason that Dockter could not have raised this issue earlier, as he has maintained throughout these proceedings that he will be without a remedy if he is not permitted to proceed against Aetna. Therefore, this Court should decline to consider this issue.

C. The Court Of Appeals Correctly Found That ERISA Preempted State Law Claims Against Aetna As Fiduciary Regardless Of Plan Termination.

The Court of Appeals correctly ruled that ERISA preempted Dockter's asserted state law claims against Aetna regardless of whether the Plan had terminated. ERISA governs all claims which relate to employee benefit plans. *See e.g. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L. Ed. 2d 49 (1987); *citing* 29 U.S.C. § 1144(a). Claims under ERISA plans that have terminated relate to an employee benefit plan within the meaning of ERISA no less than do such claims for benefits from currently operating plans. *See* 29 U.S.C. § 1002(1)(defining "employee welfare benefit plan" to include any plan which was established or maintained in the past); *see also* 29 U.S.C. § 1103(d)(setting forth rules under ERISA governing plan termination). Accordingly, it has been held that ERISA is applicable to terminated plans. *See e.g. Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1408-09, 1418-19 (9th Cir. 1988). As ERISA preempts all state law claims, *Pilot Life*, 481 U.S. at 54, the Court of Appeals below correctly found that ERISA preemption survived plan termination. *See also In re White Farm Equipment Co.*, 42 B.R. 1005, 1012 (N.D.Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186 (6th Cir. 1986) (discussing ERISA preemption and concluding that ERISA governed plan termination). The possibility raised by Dockter that termination may leave a beneficiary without a remedy has no bearing whatsoever on ERISA preemption—this Court has held that ERISA preempts state law claims even where state law authorizes a remedy unavailable under ERISA or ERISA contains no remedy. *See Ingersoll-*

Rand, 498 U.S. at 144; *see also Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S. Ct. 2063, 2071, 124 L. Ed. 2d 161 (1993) (rejecting argument that ERISA may not deprive beneficiaries of rights they had in the absence of ERISA).

D. The Ninth Circuit's Opinion Does Not Conflict With Decisions Of This Court Nor Of Other Courts Of Appeals.

Dockter's petition should be denied because it fails to establish that the Ninth Circuit's opinion in the instant matter conflicts with the decisions of this Court or of other Courts of Appeals. Dockter contends that a conflict exists on two separate issues:

(1) whether there is a "private right of action" for breach of fiduciary duties under ERISA Section 502(a)(3)[7], and

---

[7] Dockter's use of the term "private right of action" is misleading. None of the cases he cites held that there is no general private right of action for breach of fiduciary duty under ERISA. Rather, the cases hold that an individual beneficiary may only sue in a representative capacity in order to obtain benefits on behalf of the plan as a whole. The language of Sections 502(a)(2) and (3) itself expressly invests plan participants and beneficiaries with a right of action for appropriate relief under ERISA Section 409, 29 U.S.C. Section 1109, and for equitable relief for violations of ERISA or the terms of an ERISA plan, respectively. Thus, there is no question that a private right of action exists for breach of fiduciary duty under ERISA—plan participants and beneficiaries have an express statutory right to sue to protect their plan. The issue here is the nature of the remedies allowed for such a breach. Therefore, Dockter must intend the term "private right of action" to mean recovery of relief which benefits an individual plan beneficiary rather than the plan.

(2) whether the provision for recovery of "other appropriate equitable relief" in Section 502(a)(3) includes monetary relief.

Obviously, if Dockter has no individual right to relief for breach of fiduciary duty under Section 502(a)(3), the latter question concerning the type of relief available is immaterial. Therefore, the availability of relief to individual beneficiaries will be addressed first.

1. The Ninth Circuit's Decision Below That There Is No Individual Right To Relief Under Section 502(a)(3) Was Consistent With *Russell*.

Dockter incorrectly argues that as this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139, n. 5, 105 S.Ct. 3085, 87 L. Ed. 2d 96 (1985) did not reach the question of the relief available under Section ERISA 502(a)(3) but was instead limited to relief under Section 502(a)(2), 29 U.S.C. Section 1132(a)(2), the Ninth Circuit could not extend the rationale underlying *Russell* to a claim under Section 502(a)(3). ERISA Section 409(a), 29 U.S.C. Section 1109(a), describes the extent of liability for a breach of fiduciary duty by an ERISA fiduciary. Section 502(a)(2) merely creates a right of action for relief under Section 409(a).

In *Russell*, 473 U.S. at 142-44, this Court held that the language of ERISA indicates that only breaches of fiduciary duty which harm the plan itself rather than those which injure the rights of individual beneficiaries are actionable under Sections 409(a) and 502(a)(2). Neither Section 409(a) nor 502(a)(2) establish any fiduciary duties; these provisions only set forth remedies for breach of such duties. Section 502(a)(3) merely provides another remedial mechanism

for violations of other portions of ERISA, therefore, it would be anomalous to read into Section 502(a)(3) an expansion of the types of fiduciary breaches which give rise to liability. Furthermore, if the relief available for breach of fiduciary duty were broader under Section 502(a)(3) than under 502(a)(2), Section 502(a)(2) would be superfluous, an interpretation which would be contrary to proper statutory construction. *See Mertens*, 113 S. Ct. at 2069 (refusing to read ERISA in a manner that would render part of the statute superfluous).

It is quite logical that the Congressional intent to limit fiduciary liability to situations where the ERISA plan is harmed rather than those in which individual benefit claims are mishandled, which this Court declared in *Russell*, should be applied to claims for relief based on Section 503(a)(3). Therefore, the Ninth Circuit's decision below denying Dockter individual relief under Section 502(a)(3) is consistent with this Court's *Russell* decision.

2. There Is No Conflict Among The Circuits Regarding The Right To Individual Relief Under Section 502(a)(3).

Contrary to Dockter's assertion, the Ninth Circuit's opinions on the availability of individual relief for breach of fiduciary duty under Section 502(a)(3) have consistently denied such relief and are in accord with the law established in other circuits. In the language quoted by Dockter from the Ninth Circuit's decision in *Sokol v. Bernstein*, 803 F.2d 532, 536 (9th Cir. 1986) the court stated that ERISA grants no right by a "beneficiary *qua* beneficiary" to sue for breach of fiduciary duty but rather limits such actions to those brought on behalf of the plan itself. *See* Petition

at 23. The *Sokol* court declared that there was no basis not to apply this rule to Section 502(a)(3), 29 U.S.C. Section 1132(a)(3). 803 F.2d at 536. Both *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417-18 (9th Cir. 1991), which followed *Sokol*, and the Ninth Circuit's decision below, following *Horan*, invoked this limitation. Two other circuits that have addressed the issue have found that ERISA beneficiaries have no right to individual recovery under Section 502(a)(3). *See Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir.)[8], *cert. den.*, 488 U.S. 909 (1988)(recognizing that *Russell*'s conclusion that there is no right to individual recovery for breach of fiduciary duty under Section 502(a)(2) should be extended to Section 502(a)(3)); *Harsch v. Eisenberg*, 956 F.2d 651, 657 (7th Cir.), *cert. den.* ___ U.S. ___, 113 S. Ct. 61 (1992)(approving of *Sokol*'s reasoning in rejecting individual recovery for breach of fiduciary duty).

The Sixth Circuit has not taken a clear position on this issue. In the unique factual circumstances it encountered in *Warren v. Society National Bank*, 905 F.2d 975, 980-82 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S. Ct. 2256 (1991), where full benefits were paid yet the plaintiff suffered damages due to the timing of the payment, the Sixth Circuit allowed a claim by a beneficiary for individual relief under Section 502(a)(3). Dockter contends that *Warren* creates a conflict between the Sixth Circuit and other Courts of Appeals on this issue. However, as pointed out in the dissenting opinion in *Warren*, *Warren* itself is in

---

[8] The First Circuit's *Drinkwater* opinion, which Dockter miscites as conflicting with Ninth Circuit law, actually quoted and followed *Sokol*. *See* Petition at 28; 846 F.2d at 825.

conflict with other Sixth Circuit decisions. *Id.* at 984-86 (Wellford, J. dissenting). In *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 696 (6th Cir. 1989), *cert. den.*, 495 U.S. 905, *reh. den.*, 496 U.S. 932 (1990), the Court affirmed the denial of plaintiff's motion to join individual members of an ERISA benefits committee as defendants for breach of fiduciary duty. The Court found that ERISA did not allow recovery of compensatory or punitive damages by an individual beneficiary for breach of fiduciary duty. *Id.* In *International Union UAW Local 91 v. Park-Ohio Indus.*, 876 F.2d 894 (6th Cir. 1989), an unpublished opinion cited by the *Warren* dissent[9] the Sixth Circuit ruled that *Russell* precluded a claim for individual relief under Section 502(a)(3) and followed *Sokol*. *Warren*, 905 F.2d at 985 (Wellford, J. dissenting).[10]

The foregoing discussion demonstrates that there is not a conflict *among* the circuits on this issue, but rather, a conflict *within* the Sixth Circuit. Such a conflict within a particular circuit does not constitute the type of conflict which will support a grant of certiorari within the express terms of Supreme Court Rule 10.1. Furthermore, this Court ordinarily will not

---

[9] The Sixth Circuit permits citation of unpublished opinions if no published opinion would serve as well. Sixth Circuit Rule 24(c).

[10] Furthermore, *Warren* is distinguishable from the instant case because the *Warren* plaintiff had received all the benefits to which he was entitled and was suing not to recover benefits but instead for damages suffered as a result of the fiduciary's alleged misconduct. *See* 905 F.2d at 976. Here, by contrast, Dockter merely seeks benefits. Therefore, the *Warren* opinion does not provide a basis for granting Dockter's petition.

grant certiorari to resolve a conflict internal to one circuit. *See e.g.*, 13 Moore's Federal Practice ¶ 810.21 and Stern, Gressman & Shapiro *Supreme Court Practice* § 4.6 (1986), both *citing* Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958); *cf. Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 351, 38 L. Ed. 2d 234 (1973)(noting this Court's previous denial of certiorari petition where party opposing petition showed that conflict alleged was intra-circuit); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957)(stating that it is primarily the task of the Court of Appeals to reconcile its internal differences and refusing to accept certified question pertaining to intra-circuit conflict). Even if this Court were inclined to disregard its customary practice and to consider the Sixth Circuit's internal conflict, this petition is not an appropriate vehicle for so doing because it involves a *Ninth* Circuit decision. Therefore, the existence of one Sixth Circuit decision among several which conflicts with the decision below should not be considered to provide a basis for granting Dockter's petition.

3. This Court's Opinion in *Mertens v. Hewitt Associates* Precludes Any Conflict Among The Courts Of Appeals Regarding The Availability Of Damages Under Section 502(a)(3).

In its recent decision in *Mertens*, 113 S. Ct. at 2068-69, this Court ruled that the remedies available under Section 502(a)(3) did not include monetary relief. This Court's decision that the phrase "other appropriate equitable relief" used in Section 502(a)(3) is limited to relief typically recoverable in equity, such as injunctions, mandamus and restitution, precludes any conflict among the Courts of Appeals in regard to the availability of monetary relief. Therefore, Dock-

ter's contention that he has a right to pursue a contractual entitlement to monetary benefits under Section 502(a)(3) must be rejected.

4. The Interpretation In *Mertens* Is Not Limited To Claims Against Non-Fiduciaries, However, Even If It Was So Limited, There Is No Conflict Among The Circuits Regarding The Availability Of Damages Under Section 502(a)(3).

Although *Mertens* involved the restricted question of a non-fiduciary's liability for monetary damages under ERISA, this Court's interpretation of the language of Section 502(a)(3) contained therein is equally applicable to claims against fiduciaries. *See Kuhl v. Lincoln Nat'l Health Plan of Kansas City*, 999 F.2d 298 (8th Cir. July 7, 1993) (currently available on WESTLAW; reference occurs at page 28 of 30)(stating that *Mertens* ratified the Court of Appeals decisions holding that Section 502(a)(3) does not include monetary relief). This Court's analysis in *Mertens* focused on Congress' intent in using the modifier "equitable" to describe the type of relief permitted. *See* 113 S. Ct. at 2068-71. On its terms, Section 502(a)(3) makes no distinction between the relief available from fiduciaries as opposed to non-fiduciaries. Nor was this Court's construction of Section 502(a)(3) based on the circumstance that the defendant in *Mertens* was not a fiduciary. Thus, there is no basis for limiting the statutory interpretation in *Mertens* to actions against non-fiduciaries. This Court's decision in *Mertens* precludes Dockter's argument that he may seek monetary relief from Aetna under Section 502(a)(3).

Even if *Mertens* was not applicable to claims under Section 502(a)(3) against fiduciaries, Dockter's argu-

ment must fail because there is no conflict among the Courts of Appeals as to the unavailability of monetary relief thereunder. On the contrary, the overwhelming weight of authority has established that monetary relief may not be recovered. The Ninth Circuit and eight of the ten other circuits have unequivocally held that "equitable" relief under Section 502(a)(3) does not include monetary relief for breach of fiduciary duty. *See Sokol*, 803 F.2d at 537 (9th Cir.); *Drinkwater*, 846 F.2d at 825 (1st Cir.); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2nd Cir. 1993); *Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. den.*, 476 U.S.1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464-65 (5th Cir.), *reh. den.*, 797 F.2d 977 (1986), *cert. den.*, 479 U.S. 1034, 479 U.S. 1089 (1987); *Harsch*, 956 F.2d at 656-60 (7th Cir.); *Novak v. Anderson Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *cert. den.*, ___U.S. ___ , 113 S. Ct. 2928 (1993); *Lafoy v. HMO Colorado*, 988 F.2d 97, 99-101 (10th Cir. 1993); *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1508-09 (11th Cir.), *reh. den.*, 861 F.2d 1281 (1988), *cert. den.*, 489 U.S. 1096, *reh. den.*, 490 U.S. 1076 (1989).

The Sixth Circuit has taken conflicting positions as to the right to monetary relief for breach of fiduciary duty under Section 502(a)(3). The *Warren* opinion permitted a claim for monetary relief under Section 502(a)(3). *See* 905 F.2d at 980-82. However, as discussed above, *Warren* is in conflict with other Sixth Circuit cases, *see id.* at 984-86 (Wellford, J. dissenting) *citing Davis*, 887 F.2d at 696 and *International Union UAW Local 91*, 876 F.2d 894, and the exist-

ence of an intra-circuit conflict in the Sixth Circuit is not sufficient to support a grant of certiorari, particularly in this case, which comes to this Court from the Ninth Circuit, and in view of the otherwise unanimous decisions of the other Courts of Appeals.

V. CONCLUSION

For all of the foregoing reasons, Aetna respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN J. [illegible]VENSON
Counsel of Record
THOMAS E. SATROM
LAWRENCE E. KOLE
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 4000
Los Angeles, California 90067-3026
(310) 552-8500

Attorneys for Respondent
Aetna Life Insurance Company